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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1973

No. 72-1739

GERALD A. SCHROEDER and CLARA JOHNSON SCHROEDER,

Petitioners,

vs.

TRUSTEES OF SCHOOLS OF TOWNSHIP 42 NORTH, RANGE 11, EAST OF THE THIRD PRINCIPAL MERIDIAN, COOK COUNTY, ILLINOIS, and BOARD OF EDUCATION, SCHOOL DISTRICT NO. 57, COOK COUNTY, ILLINOIS,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT, SECOND DIVISION

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PETITION FOR WRIT OF CERTIORARI TO THE
APPELLATE COURT OF ILLINOIS,
FIRST DISTRICT, SECOND DIVISION.

The petitioners, Gerald A. Schroeder and Clara Johnson Schroeder, respectfully pray that a writ of certiorari issue to review that part of the judgment and opinion of the Appellate Court of the State of Illinois, First District, Second Division, entered in this proceeding on October 24, 1972, which affirmed the order of the trial court enjoining petitioners from pursuing

further litigation and denying them leave to file a counter-complaint.

OPINION BELOW

The opinion of the Appellate Court of the State of Illinois, not yet reported, appears in the Appendix hereto. No opinion was rendered by the Illinois Supreme Court in denying the petition for leave to appeal.

JURISDICTION

The judgment of the Appellate Court of the State of Illinois was entered October 24, 1972. No petition for rehearing was filed. A timely petition for leave to appeal was filed in the Supreme Court of Illinois. This petition was denied on March 27, 1973, and this petition for certiorari is filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1257.

QUESTIONS PRESENTED

I. WHETHER AN INJUNCTION AGAINST "INSTITUTING OR PROSECUTING ANY PROCEEDINGS, LEGAL, EQUITABLE OR OTHERWISE,...AFFECTING TITLE IN CERTAIN REAL ESTATE VIOLATES CONSTITUTIONAL SAFEGUARDS IN THAT IT PREVENTS ACCESS TO THE COURTS AND COUNSEL, DENIES DUE PROCESS AND EQUAL PROTECTION OF THE LAWS, VIOLATES PRIVILEGES AND IMMUNITIES OF UNITED STATES CITIZENSHIP, INVADES THE RIGHT OF FREE SPEECH, AND VIOLATES PUBLIC POLICY BY CLOSING ACCESS TO THE COURTS.

II. WHETHER IT IS AN UNCONSTITUTIONAL DEPRIVATION OF DUE PROCESS OF LAW TO BAR A COUNTERCOMPLAINT RAISING A PREVIOUSLY UNDECIDED ISSUE, IN A CAUSE OF ACTION INITIATED BY THE PARTY CLAIMING THE PROTECTION OF RES JUDICATA.

III. WHETHER REFERENCE TO A MASTER IN CHANCERY THREE YEARS AFTER PASSAGE OF THE ILLINOIS CONSTITUTION JUDICIAL AMENDMENT ABOLISHING MASTERS IN CHANCERY, ALMOST TWO YEARS AFTER SAID AMENDMENT BECAME EFFECTIVE, EIGHTEEN DAYS PRIOR TO THE DATE THAT THE ILLINOIS SUPREME COURT FINALLY ABOLISHED THE TERM OF THE CHANCELLOR, AND WITH ONLY BRIEF TESTIMONY TAKEN TWO DAYS BEFORE THE "FINAL" EXPIRATION OF THE TERM OF THE CHANCELLOR, WITH A JUDGMENT (INCLUDING THE MASTER IN CHANCERY'S FEES) BASED UPON THE MASTER'S HEARINGS AND REPORTS OVER A PERIOD OF THREE YEARS FOLLOWING THE SUPPOSED "FINAL" EXPIRATION OF THE MASTER'S TERM AND ALMOST SIX YEARS AFTER THE PASSAGE OF THE JUDICIAL AMENDMENT, COMBINED WITH THE DEATH OF THE SITTING JUDGE WHO HAD HEARD AND CONSIDERED ALL PROCEEDINGS IN A CASE OVER A PERIOD OF SOME THREE YEARS, AND HAD MADE A TENTATIVE DECISION BASED UPON SUCH MASTER'S REPORTS, FOLLOWED BY A SUCCESSOR JUDGE ENTERING "AN ACT IN FORMAL FULFILLMENT" OF THE JUDICIAL DETERMINATIONS OF THE DECEASED JUDGE WITHOUT INDEPENDENT DETERMINATION, VIOLATES FEDERAL DUE PROCESS RIGHTS.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitution of the United States, Amendment I:

> "Congress shall make no law respecting an establishment of religion, or prohibiting t he free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The Constitution of the United States, Amendment XIV:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive a person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws."

Illinois Revised Statutes, Chapter 110, Section 41:

"Allegations and denials, made without reasonable cause and not in good faith, and found to be untrue, shall subject the party pleading them to the payment of reasonable expenses, actually incurred by the other party by reason of the untrue pleadings, together with a reasonable attorney's fee, to be summarily taxed by the court at the trial."

STATEMENT OF THE CASE

This was a suit by plaintiffs, the trustees of schools of a township, and the board of education of a school district, against Gerald A. Schroeder and his wife, Clara, to restrain allegedly vexatious and harassing litigation and recover damages therefor. The cause was referred to a Master in Chancery. After approving his first report, the trial court entered a decree by which defendants were permanently enjoined from instituting any proceedings for the purpose of affecting title to real estate which had been the subject of a prior condemnation.

Basically, the history of this litigation began in 1959, when the township school trustees initiated condemnation of the Schroeders' farm and market. Following the jury verdict, there was a successful motion for a new trial by the school trustees, and th- Schroeders successfully appealed from that post-trial order and were eventually awarded judgment on the jury verdict. Trustees of Schools v. Schroeder, 23 Ill.2d 74, 177 N.E.2d 178. The Schroeders then appealed the denial of their traverse by the trial judge in the condemnation suit, and their attorneys raised only one of the many issues which the Schroeders had ordered them to present, brief, and argue. The appeal was decided adversely to the Schroeders. Trustees of Schools v. Schroeder, 25 Ill.2d 289, 184 N.E.2d 872.

In a later lawsuit by their original attorneys for fees, the Schroeders defended by alleging that the attorneys had been specifically requested to raise on appeal the theory that the eminent domain provisions of the 1959 State of Illinois School Code authorized the taking of no greater estate than a "fee simple determinable." Trustees of Schools v. Schroeder, Wahler, et al. v. Schroeder, et al., 2 Ill.App.3d 1009, 278 N.E.2d 431. However, an attempt to raise this issue, along with other issues, was denied on grounds of estoppel. People ex rel. White v. Busenhart, 29 Ill. 2d 156, 193 N.E.2d 850. Similar attempts in the federal courts, including attempts at federal civil rights charges, were unsuccessful as a collateral attack, Schroeder v. State of Illinois, 354 F.2d 561, as was another state court lawsuit charging conspiracy. Schroeder v. Busenhart, 80 Ill.App. 2d 431, 225 N.E.2d 702. The latter attempt resulted in a substantial judgment for attorneys' fees against the Schroeders under Section 41 of the Civil Practice Act of the State of Illinois. Smith-Hurd Annotated, Ch. 110.

In November, 1964, the Trustees of Schools then initiated the present action by a "complaint in chancery for injunction and other relief." The complaint did not allege that any further litigation was initiated or about to be initiated by the Schroeders, but merely stated that "under the circumstances, plaintiffs ought to be granted a permanent writ of injunction...," and requested compensation for costs, attorneys' fees, and expenses incurred in defending all litigation except for the first two appeals. After the trial court granted

the injunction, based on the first report of the Master in Chancery, the defendants moved to vacate the decree and for leave to file a counterclaim. The motion was denied. Then, the cause was re-referred to the Master to hear evidence and determine damages which the plaintiffs were entitled to recover from defendants "(f)or their attorneys' fees, expenses and costs incurred..." in the litigation in which defendants engaged after affirmance of the condemnation judgment. The Master found and reported to the court that plaintiffs were entitled to recover from defendants the sum of $23,930.00 in attorneys' fees and $614.21 in expenses. After hearing and overruling exceptions to the report, the trial court entered a judgment that awarded plaintiffs damages in the sum of $24,544.21.

The Appellate Court herein reversed the decision of the trial court, based upon the report of the Master in Chancery, for attorneys' fees and damages. The Appellate Court herein, however, upheld the injunction and upheld the refusal of the trial court to allow the defendants to file a counterclaim, which rulings are the subject of this appeal.

The Supreme Court of the State of Illinois denied the petition for leave to appeal.

REASONS FOR GRANTING THE WRIT

I. AN INJUNCTION AGAINST "INSTITUTING OR PROSECUTING ANY PROCEEDINGS, LEGAL, EQUITABLE OR OTHERWISE,...AFFECTING TITLE" IN CERTAIN REAL ESTATE VIOLATES CONSTITUTIONAL SAFEGUARDS IN THAT IT PREVENTS ACCESS TO THE COURTS AND COUNSEL, DENIES DUE PROCESS AND EQUAL PROTECTION OF THE LAWS, VIOLATES PRIVILEGES AND IMMUNITIES OF UNITED STATES CITIZENSHIP, INVADES THE RIGHT OF FREE SPEECH, AND VIOLATES PUBLIC POLICY BY CLOSING ACCESS TO THE COURTS.

An injunction against litigation is a drastic remedy, since it purports on its face to preclude a citizen from access to those very institutions of the nation which are designed for settling disputes, namely, the courts. Thus, the policy reasons against such prior "censorship" or prior restraint are even stronger than the policy reasons preventing prior censorship in free speech and related cases. As an early Illinois case phrased it, an injunction against litigation causes "injury wholly remedyless at law." Eberhardt, 15 Ill.App. 54, 1884. Petitioners seek review in this Court of the decision of the Appellate Court of the State of Illinois affirming the trial court order which permanently enjoined petitioners against instituting or prosecuting any proceedings, legal, equitable or otherwise, which would affect title to a particular parcel of real estate. Petitioners feel that this decision should be reviewed because its effect is to deprive them of access to courts and counsel, one of the privileges and immunities of United States citizenship, to deny them equal protection of the laws, and to subject them to loss of very valuable property without adequate due process of law.

A. The case of Chambers v. B.&O.R.Co., 207 U.S. 142, 28 Sup.Ct. 34, 52 L.Ed. 143 (1907), firmly establishes that ready access to judicial tribunals is one of the privileges and immunities of United States citizenship secured and preserved for all Americans by the Fourteenth Amendment to the United States Constitution. The injunction issued in the present case completely deprives petitioners of access to the courts for determination of an as yet unresolved issue which vitally affects their lives. As such, courts of the State of Illinois have imposed a sanction against the petitioners which deprives them of one of the privileges and immunities of United States citizenship.

In the Chambers case, the courts stated that the right of ready access to courts of law, 207 U.S. 142 at 148,

> "is the right conservative of all of the rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship...."

In the American system, it is intended that courts of law will always be available to provide an alternative to the use of force and physical power as a means of solving problems. In the present case, however, that alternative has been forever withdrawn from the petitioners.

This extraordinary and unlawful deprivation of personal and civil rights occurred in spite of the fact that there were clear, compelling reasons to deny the injunction. In the first place, the petitioners did not initiate the litigation which gave rise to the order - the respondents did. If the

respondents were so concerned that they would be made a party to vexatious and harassing litigation, it would have been a simple matter to seek relief by counter-claim in the event they were sued by the petitioners.

B. The real injustice and perhaps the most compelling reason to grant the writ of certiorari is that the injunction permanently bars the petitioners from litigating an issue which has never been decided by any court in spite of the lengthy proceedings between the parties herein.

As the Schroeders have repeatedly maintained, a long train of cases all recognize the proposition in Illinois law that taking of land by eminent domain and condemnation grants only a determinable fee, easement, or the minimum estate necessary for the public purpose, unless the condemnation statute expressly grants the power to condemn in fee simple absolute. Kelly v. Bowman, 104 F.Supp. 973 (E.D.Ill. 1952); City of Waukegan v. Stanczak, 6 Ill. 594, 129 N.E.2d 751 at 757 (1955); Miller v. Commissioners of Lincoln Park, 278 Ill. 400, 116 N.E. 178 (1917); Superior Oil Co. v. Harsh, 39 F.Supp. 467 (1941) aff'd 7th Cir., 126 F.2d 572; Miner v. Yantis, 410 Ill. 401, 102 N.E.2d 524 (1951); and most recently, Mattion v. Trustees of Schools Township 41, 2 Ill.App.2d 135, 279 N.E.2d 66 (1971); cf. Kendrick v. City of St. Paul, et al., 213 Minn. 283, 6 N.W.2d 449; but see dicta to the contrary, Trustees of Schools, et al., v. Schroeder, et al, 2 Ill.App.2d 1009, 278 N.E.2d 431 (1971).

These cases reiterate the proposition that condemnation cannot acquire fee simple

unless the statute specifically so authorizes. Miner and Mattion both take note of the fact that condemnation has a distinctive rule in this regard but find on the facts of their cases that the school acquired title by warranty deed and by grant and therefore the fee simple determinable provisions of condemnation cases do not apply. The Stanczak case finds that as the school system was a city school under a special city charter granted by the State, the city and therefore the school had power to condemn in fee simple absolute.

Of course, the familiar rule of law that in condemnation a lesser interest if taken than fee simple is the subject of frequent and extensive litigation. For numerous representative cases from many jurisdictions, see American Bar Association, Section on Local Government Law, Committee on Condemnation and Condemnation Procedure, 1964 Report of Committee, "Nature of Interest Taken," 24-27.

Both the trial court and the appellate court herein decided against the Schroeders because they held that the issue of "fee simple determinable" in condemnation raised by the counterclaim were barred by res judicata. The history of this litigation and the case law in Illinois make it abundantly clear that the issues framed by the counter-complaint have not previously been litigated and could properly be asserted by counterclaim.

The original condemnation court order indicated only that a "fee simple" interest was acquired, and it does not specify whether the interest was absolute or determinable. This clarification of the nature and

duration of the estate taken has never been ruled on substantatively, either at the trial or the appellate level.

The injunction prevents any possibility of receiving a judicial determination of this issue. Unless and until this issue is finally determined, it will remain a fact that the land was taken from the petitioners without complete due process of law. This is particularly true in light of the fact that the entire body of case laws interpreting Illinois statutory provisions indicates that, in fact, the land should revert to the petitioners.

C. Furthermore, the injunction was granted in contravention of all well-established rules of equity. In Younger v. Harris, 401 U.S. 37, at 43-44, 91 Sup.Ct., 746, 27 L.Ed.2d 669 (1971), the court stated that the

> "basic doctrine of equity jurisprudence (is) that courts of equity should not act ...when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief."

Under Ill.Rev.Stat., Chap. 110, Sec. 41, respondents have an adequate legal remedy if anyone brings a suit against them solely to vex and harass them. That particular statutory provision provides

> "allegations and denials, made without reasonable cause and not in good faith, and found to be untrue, shall subject the party pleading them to the payment of reasonable expenses, actually incurred by the other party by reason of the untrue pleading, together with a reasonable attorney's fee, to be summarily taxed by

the court at the trial."

This is certainly an adequate legal remedy. The Younger case indicates that equitable relief should not lie in this case.

The Schroeder injunction met none of the familiar fundamental and elementary rules of injunction prerequisites: there was no showing whatever of any imminent or immediate threat of the Schroeders filing further lawsuits; there was no allegation or showing of any sort that the injury would be irreparable (it is difficult to imagine any irreparable injury that can be inflicted upon a school board by filing a lawsuit against it); and, finally, the remedies at law here were many and complete.

The combination of lack of imminent harm and lack of irreparable injury makes especially forceful the United States Supreme Court caution that

> "an injunction is premature if founded upon a contingency" Memphis v. Dean, 8 Wall 64, 19 L.Ed 326,

and dramatically exposes the trial court denial of due process to the Schroeders.

D. Moreover, the injunction order prohibits the petitioners, under a possible contempt penalty, from litigating any matters pertaining to their land in the federal courts as well as the state court. Such invasion of the authority of the federal court has long been disapproved. In the case of Riggs v. Johnson County, 6 Wall 166 (1868), it was stated that

"it is obvious that the injunction of a state court is inoperative to control, or in any manner to affect the process of proceedings of a circuit court (federal), not on account of any paramount jurisdiction in the latter courts, but because, in their sphere of action, circuit courts are wholly independent of any state tribunal."

The petitioners contend that the state court is without power to enjoin prospective suits in the federal courts. Donovan v. Dallas, 377 U.S. 408, 84 Sup.Ct. 1579, 12 L. Ed.2d 409 (1964), so holds. In fact, Donovan indicates that even when litigation reaches the point of being vexatious and harassing and even when the doctrine of res judicata may bar further proceedings, the state court does not have the authority to enjoin federal court action. And, of course, numerous cases hold that a second lawsuit on a different legal theory is prima facie not vexatious. American Electrolyte v. Kerschbaum, 105 F.2d 764, 70 App.D.C. 241.

E. On a more profound level, however, an injunction against litigation is fundamentally against public policy. Not only is closing the door to the courts an invitation to litigants to take their case to the streets, but to restrain for the indefinite future an individual from pursuing a grievance is to foreclose a cause of action perhaps as yet unknown. The law has advanced through the creation of new issues and through the ingenuity of litigants in rephrasing old questions in ways appealing to the judges of the future. Res judicata is a harsh rule, and one with subtle overtones; collateral estoppel is likewise a doctrine of many subtleties. A

wide catalog of issues in civil rights, segregation, equal protection, rights of privacy, rights of persons accused of crime, and dozens of modern legal issues could have been prohibited from being raised in past courts by blanket injunctive prohibitions against future litigation such as the one attempted herein.

To require a prospective litigant to first undergo the burden of setting aside an injunction order before he may litigate is not only to reverse the burden of proof but to discourage attorneys from representing him and to prejudice in advance his cause of action.

* * * * *

The court herein ordered that the Schroeders:

> "...are hereby permanently and perpetually enjoined and restrained from instituting or prosecuting any proceedings, legal, equitable, or otherwise...or in any proceedings ancillary or supplemental thereto affecting title in the premises described...." (C. 226.)

This overly broad and sweeping prohibition against litigation barring causes of action as yet unknown is totally unsupported by any allegation of permanent injury, is completely unidentified with any irreparable harm, and has any conceivable damage completely remediable in law. Such a decree can only serve to hinder the public policy of free access to the courts, restrain settlement of disputes by litigation, and restrict the development of the common law by legal growth through the adversary process.

II. IT IS AN UNCONSTITUTIONAL DEPRIVATION OF DUE PROCESS OF LAW TO BAR A COUNTER-COMPLAINT RAISING A PREVIOUSLY UNDECIDED ISSUE, IN A CAUSE OF ACTION INITIATED BY THE PARTY CLAIMING THE PROTECTION OF RES JUDICATA.

As the statement of facts indicates, this suit was initiated by respondents. The petitioners sought to raise by counterclaim the issue of the nature and extent of fee condemned by the municipality. The trial court denied leave to file the counterclaim, citing the doctrine of res judicata as a bar to the filing of said claim. The petitioners contend that the doctrine of res judicata does not serve as a bar to the counterclaim, that the court therefore abused its discretion in denying leave to file this counterclaim in light of the fact that the resolution of that one single issue would be determinative of critically important property rights, and that such an abuse constituted a denial of due process of law to the petitioners.

The trial court failed to recognize the distinction between res judicata and collateral estoppel. Where a subsequent litigation is upon a different claim or cause of action, a prior determination is conclusive, or res judicata, only as to the issues and questions which were actually litigated and determined therein and not as to matters which might have been litigated and determined in the former action. Lawlor v. National Screen Service, 349 U.S. 322, 326, 75 S.Ct. 865, 99 L.Ed. 1122 (1959); Rankin v. Florida, 418 F.2d 489 (1969), Cert.Den., 397 U.S. 1039, 90 S. Ct. 1358, 25 L.Ed2d 650.

Because of the fact that a party should not be faced with a constant threat of a

lawsuit, the doctrine of collateral estoppel supplements the doctrine of res judicata, in that it bars issues and questions which could have been raised in a prior action, regardless of whether or not they were in fact raised. However when, as here, the "protected party" initiates a subsequent action involving other issues, the policy considerations are entirely different. When this occurs, the underlying concern is uniformity, certainty, and consistency of any decisions which may be reached, as well as reaching complete justice between the parties. Thus, only the doctrine of res judicata would be applicable in the present case. Hoffman v. Hoffman, 330 Ill. 413, 161 N.E. 723. In the present case, the nature and extent of the fee interest has never been litigated or ruled upon, and it should have been allowed in the counterclaim. Adams v. Pearson, 411 Ill. 431, 104 N.E.2d 207 (1952).

The federal courts have repeatedly recognized that due process is applicable notwithstanding res judicata, for even though the same circumstances and transactions may give rise to two cases, entirely different facts (and issues) are essential to maintaining each. Scoggin v. Schrunk, 344 F.Supp. 463, 469 (1971). Here there is more than

> "one right of the plaintiff and one wrong by the defendant involving that right...." Bankers Trust Co. v. Pacific Employees Ins. Co., 282 F.2d 106 (9th Cir. 1960), cert.den. 368 U.S. 822, 82 S.Ct. 41, 7 L.Ed.2d 27 (1961)

Moreover, numerous federal court cases have allowed what would appear to be an actual review of an adjudicated state case for the

purpose of clarifying and interpreting the final decision rendered. Countee v. U.S., 112 F.2d 447 (1940); Brown v. U.S., 39 F. Supp. 82; and Premier Electrical Construction Company v. Miller-Davis Company, et al. 422 F.2d 1132 (1970).

In light of the foregoing authority, the trial court should have allowed the petitioners to file a counterclaim. The failure of the court to do so constitutes deprivation of due process of law. The petitioners are in a position where they have no legal process available to them to claim their reversionary interest in their land. That they have a reversionary interest is clear under the holding of Kelley v. Bowman, 104 F.Supp. 973 (E.D.Ill., 1952). That case stated that a school district in Illinois receives only a determinable fee, and that when the condemned land is abandoned as a school site, the reversionary interest vests in the successors to title.

The result of the trial court action, then, is to deny the petitioners access to the only legal proceeding in which they can assert their claim, and this is a clear deprivation of due process in violation of the Fourteenth Amendment.

III. REFERENCE TO A MASTER IN CHANCERY THREE YEARS AFTER PASSAGE OF THE ILLINOIS CONSTITUTION JUDICIAL AMENDMENT ABOLISHING MASTERS IN CHANCERY, ALMOST TWO YEARS AFTER SAID AMENDMENT BECAME EFFECTIVE, EIGHTEEN DAYS PRIOR TO THE DATE THAT THE ILLINOIS SUPREME COURT FINALLY ABOLISHED THE TERM OF THE CHANCELLOR, AND WITH ONLY BRIEF TESTIMONY TAKEN TWO DAYS BEFORE THE "FINAL" EXPIRATION OF THE TERM OF THE CHANCELLOR, WITH A JUDGMENT (INCLUDING THE MASTER IN CHANCERY'S FEES) BASED UPON THE MASTER'S HEARINGS AND REPORTS OVER A PERIOD OF THREE YEARS FOLLOWING THE SUPPOSED "FINAL" EXPIRATION OF THE MASTER'S TERM AND ALMOST SIX YEARS AFTER THE PASSAGE OF THE JUDICIAL AMENDMENT, COMBINED WITH THE DEATH OF THE SITTING JUDGE WHO HAD HEARD AND CONSIDERED ALL PROCEEDINGS IN A CASE OVER A PERIOD OF SOME THREE YEARS, AND HAD MADE A TENTATIVE DECISION BASED UPON SUCH MASTER'S REPORT, FOLLOWED BY A SUCCESSOR JUDGE ENTERING "AN ACT IN FORMAL FULFILLMENT" OF THE JUDICIAL DETERMINATIONS OF THE DECEASED JUDGE WITHOUT INDEPENDENT DETERMINATION, VIOLATES FEDERAL DUE PROCESS RIGHTS.

The judicial amendment to the Illinois Constitution was approved by the voters on November 6, 1962, and was effective January 1, 1964. It recited that

> "there shall be no masters in chancery or other fee officers in the judicial system.: Article VI, Sec. 8.)

The implementation schedule of that amendment provided that the masters in chancery in office on the effective date

> "shall be continued as masters in chancery ...until the expiration of their terms, and may thereafter by order of court,

wherever justice requires, conclude matters in which testimony has been received."

On November 8, 1965, the Court entered a brief order denying the motion to dismiss and referring the case to the named Master in Chancery, with the following curious explanation:

"With respect to said motion of plaintiff to strike certain portions of defendants' amended answer in view of the circumstances that there will be no masters in chancery after December 3, 1965 and that as a practical matter no references to masters can be made after November 26, 1965, and in order to put this case at issue so it can be promptly referred to a master, it is hereby ordered that said motion to strike be and the same is hereby denied." (C.164)

Accordingly, a brief hearing was held before the Master on December 1, 1965, which was referred to in a later hearing as "he wanted to get in under the gun on your hearings so he put him on cross examination." (Report of Proceedings before Master Ambrose P. Finn, March 8, 1966. P. 60)

The record in this case is replete with a conscious avoidance of the mandate of the electorate in amending the Illinois Constitution, and the Rules of the Illinois Supreme Court implementing this amendment.

It further is respectfully submitted that a judge cannot merely be a "rubber stamp" for another judge, but due process requires that the successor must exercise at least some minimal independent awareness and decision on the controversy before him.

CONCLUSIONS

The foregoing amply demonstrates that the decision of the Appellate Court herein denies the defendants their constitutional rights in failing to authorize the filing of a counterclaim and in upholding the injunction herein.

The legitimate counterclaim of the Schroeders, seeking clarification of the "fee simple" judgment, whether absolute or determinable, was wrongfully denied by the trial and Appellate courts.

On the merits of the injunction, enjoining "any proceedings...ancillary or supplemental thereto...." is an overly broad and sweeping prohibition against citizens' access to the courts, and includes the prohibition of raising federal issues, including federal constitutional issues, in the state courts. The two lawsuits filed by the Schroeders which the plaintiffs allege as vexatious were on entirely different causes of action than the original condemnation and the appeal of its award and traverse, and raised legitimate new issues. There was absolutely no showing of any intention by the Schroeders to file a further lawsuit, no showing of imminent injury, no showing of irreparable harm, and in fact the damages at law were fully adequate. Such attempts at prior restraint and discouraging of counsel can only restrict the full public access to and confidence in the courts.

For all of these reasons, the case should be reversed and summary judgment be entered for the defendants, or, in the

alternative, the case remanded for proper trial on the issues with full, fair safeguards and fully in compliance with the letter and spirit of the Constitution and statutes.

Respectfully submitted,

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APPENDIX

No. 55877 Not yet reported.

TRUSTEES OF SCHOOLS OF TOWNSHIP 42 NORTH, RANGE 11, EAST OF THE THIRD PRINCIPAL MERIDIAN, COOK COUNTY, ILLINOIS and BOARD OF EDUCATION, SCHOOL DISTRICT 57, COOK COUNTY, ILLINOIS,	)	APPEAL FROM CIRCUIT COURT COOK COUNTY
Plaintiffs-Appellees,	)	_____
v.	)	
GERALD A SCHROEDER and CLARA JOHNSON SCHROEDER,	)	HONORABLE WALKER BUTLER, PRESIDING.
Defendants-Appellants.	)	

MR. JUSTICE LEIGHTON delivered the opinion of the Court.

This was a suit by plaintiffs, trustees of schools of a township and the board of education of a school district, against Gerald Schroeder and his wife Clara to restrain vexatious and harassing litigation and recover damages therefor. The cause was referred to a Master in Chancery. After approving his first report, the trial court entered a decree which found that following affirmance of a condemnation judgment by the Supreme Court, defendants had engaged in vexatious and harassing litigation with plaintiffs. Defendants were permanently enjoined from instituting any proceeding for the purpose of affecting the verdict

and judgment entered in the condemnation case. The long and bitter history of the litigious controversy that formed the factual base for the decree is recounted in Schroeder v. Busenhart, 80 Ill.App.2d 431, 225 N.E.2d 702. We will not repeat it here.

Thereafter, defendants moved to vacate the decree and for leave to file a counterclaim. The motion was denied. Then, the cause was re-referred to the Master to hear evidence and determine damages which plaintiffs were entitled to recover from defendants "(f)or their attorneys' fees, expenses and costs incurred***" in the litigation in which defendants engaged after affirmance of the condemnation judgment. Evidence heard by the Master consisted of testimony by the lawyers who represented plaintiffs in the litigation. This testimony was supported by law office time records and entries of disbursements for expenses. Proof was made that plaintiffs, as billed by the lawyers, paid the attorneys' fees and the expenses. Neither the testimony of the lawyers nor their supporting evidence was controverted by defendants. The Master found and reported to the court that plaintiffs were entitled to recover from the defendants the sum of $23,930 in attorneys' fees and $614.21 in expenses. After hearing and overruling exceptions to the report, the trial court entered a judgment that awarded plaintiffs damages in the sum of $24,544.21.

In this appeal defendants present several issues. We will decide only two. 1. Whether the defendants were denied constitutional rights (a) by reference of the cause to a Master, after the office of Master in Chancery was constitutionally abolished; (b) by refusal of the trial court to

allow defendants to file a counterclaim; (c) by issuance of a decree that permanently enjoined defendants from instituting further litigation attacking the fee simple title to land which plaintiffs acquired in a condemnation proceeding. 2. Whether in a suit to enjoin vexatious and harassing litigation, Illinois law allows recovery of attorneys' fees and expenses as elements of damages.

After considering the arguments of the parties on the first issue, we conclude that reference of the cause to the Master was proper. He was in office when the suit was filed, when the constitutional amendment abolished Masters in Chancery and when, by appropriate orders, the reference was made. Therefore, he had the authority to hear the case. House of Vision, Inc. v. Hiyane, 37 Ill.2d 32, 36, 225 N.E.2d 21; compare People ex rel. Martoccio v. Atten, 42 Ill.2d 212, 246 N.E.2d 265.

Defendants could have filed the counterclaim with their answer, but when they asked leave to file it post-decree, it was for the trial court to decide whether leave should be granted. Bernat v. Hendrickson, 327 Ill. App. 332, 64 N.E. 235 (abstr.). The trial court had discretion to allow or deny filing of the counterclaim. Evaskus v. Neff, Kohlbusch and Bissell, Inc., 40 Ill.App.2d 416, 189 N.E.2d 542 (abstr.). This was particularly true when plaintiffs, in their objections, showed that defendants were seeking to relitigate issues barred by the doctrine of res judicata. See People v. Busenhart, 29 Ill. 2d 156, 195-60, 193 N.E.2d 850; Trustees of Schools of Tp. 42 North v. Schroeder, 2 Ill. App.3d 1009, 1015, 278 N.E.2d 431.

As to the injunction decree, defendants do not question the trial court's finding that they engaged in vexatious and harassing litigation with plaintiffs. It is well established that a court has inherent power to protect itself and litigants against vexatious and harassing litigation. People v. Circuit Court of Lake County, 31 Ill.2d 170, 173, 201 N.E.2d 109; Shatz v. Paul, 7 Ill.App.2d 223, 129 N.E.2d 348. It follows that neither reference of the cause to the Master, denial of leave to file the counterclaim nor entry of the permanent injunction decree deprived defendants of any constitutional right. House of Vision, Inc. v. Hiyane; supra; see Bowman v. Lake County Public Building Commission, 31 Ill.2d 575, 203 N.E.2d 129. We now turn to the issue concerning the judgment for damages.

Arguing their position on damages, plaintiffs first contend that defendants have not preserved the issue for review. The record, however, discloses that before answering plaintiffs' complaint, defendants made a motion to strike and dismiss. One of defendants' grounds was that the complaint did "(n)ot state a cause of action (because) there is no cause of action in the State of Illinois for various costs of suit, attorneys' fees or other expenses except as allowed by statute, or as provided by contract or agreement between the parties***." The motion was denied. This ruling preserved for review the issue whether in a suit to enjoin vexatious and harassing litigation, Illinois law allows recovery of attorneys' fees and expenses as elements of damages. See J. & R. Electric Co. v. Edward P. Allison Co., 125 Ill.App.2d 123, 260 N.E.2d

755. Therefore, we must reject plaintiffs' first contention.

Plaintiffs also contend that the award of damages was proper because under Illinois law compensatory damages can be recovered by a party injured by vexatious and harassing litigation. In support of this contention, plaintiffs cite American Optometric Ass'n v. Ritholz, 101 F.2d 883, 888 (7 Cir. 1939) where it was held that "(t)he facts of this case present a cause which, under the Illinois decisions, would entitle the plaintiff to recover damages for all injuries which are the proximate result of the malicious prosecutions instituted by the defendants in accordance with their unlawful conspiracy. One item of injury is the expense of attorneys' fees in defending the suits."

It can be readily seen that American Optometric Ass'n v. Ritholz is not in point. That case rested on a line of Illinois decisions which hold that a person who has been the victim of maliciously prosecuted suits, suits that constitute clear abuse of legal process, can recover damages. It does not support the proposition that in a suit to enjoin vexatious and harassing litigation, expenses, including attorneys' fees, can be recovered as elements of damages. This is so because under Illinois law, apart from sums allowable and taxed as costs, the expenses of trial preparation, of litigation or expenditures for counsel fees, cannot be recovered as damages. Chicago Coliseum Club v. Dempsey, 265 Ill.App. 542; Boss v. Coe Investment Co., 45 Ill.App.2d 417, 195 N.E. 2d 735; I.L.P. Damages, Section 62. The assessing of attorneys' fees against the losing party in a litigation rests wholly on statutory or contractual authority.

Ritter v. Ritter, 381 Ill. 549, 553, 46 N.E. 2d 41. In this State, there is no common law or equitable principle that allows attorneys' fees either as costs or as damages. People ex rel. Henderson v. Redfern, 104 Ill. App.2d 132, 243 N.E.2d 252; House of Vision, Inc. v. Hiyane, 42 Ill.2d 45, 245 N.E.2d 468. Therefore, because there is no statute or contract to support the recovery as damages of expenses and attorneys' fees in a case like this one, we are constrained to conclude that Illinois law does not authorize the judgment in favor of plaintiffs for $23,930 in attorneys' fees and $614.21 in expenses. It is one thing to enjoin defendants from pursuing vexatious and harassing litigation; it is another to impose on them a judgment for damages that will establish a legal precedent of far-reaching consequences.

For these reasons, the decree for injunction and the order denying leave to file a counterclaim are affirmed and the judgment for damages is reversed.

Affirmed in part; reversed in part.

Stamos, P.J. and Schwartz, J., Concur.

STATE OF ILLINOIS
OFFICE OF
CLERK OF THE SUPREME COURT
Springfield
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JUSTIN TAFT
Clerk

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March 27, 1973

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No. 45568 - Trustees of Schools of Township 42 North, Range 11, East of the Third Principal Meridian, Cook County, Illinois, et al., etc., respondents, vs. Gerald A. Schroeder, et al., petitioners. Leave to appeal, Appellate Court, First District.

You are hereby notified that the Supreme Court today denied the petition for leave to appeal in the above entitled cause.

Very truly yours,

/s/ Justin Taft
Clerk of the Supreme Court.